APPEAL NO. 93515

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), a contested case hearing was held in (city), Texas, on May 13, 1993, (hearing officer) presiding as hearing officer. He determined that the appellant (claimant) was not injured in the course and scope of his employment nor did he aggravate an old injury in the course and scope of his employment on (date of injury), and further, he did not suffer disability between (date of injury), and September 4, 1992, as a result of a compensable injury on (date of injury). Claimant appeals urging that the medical evidence is clear that he sustained "an exacerbation of a pre-existing injury" and that he was disabled between (date of injury), and September 4, 1992. Respondent (carrier) asserts there is probative evidence to support the decision of the hearing officer and the claimant has not shown that the findings are so against the great weight and preponderance of the evidence as to be manifestly unjust.

DECISION

Finding evidence sufficient to support the findings and conclusions of the hearing officer and that such findings and conclusions are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm.

The claimant, a bus driver, sustained a back injury in (date), when he slipped stepping off a bus. He was treated over a period of time by two doctors who are still treating him. He was subsequently returned to work on light duty and worked various position such as security guard, customer service and dispatch for some eight month until March 25, 1992, when his treating doctor certified maximum medical improvement (MMI) and assessed a five percent impairment rating. Although the claimant testified that he had driven buses short distances on occasion while on light duty, on March 28th he drove a charter bus approximately 130 miles. He states when he got back he told his supervisor that his back was bothering him and was told to contact the adjustor who referred him to his treating doctor,(Dr. S). Dr. S referred him back to (Dr. H) with whom he had previously been treating. He testified that he subsequently inquired about disputing the March 25th MMI but discover that it was too late since more than 90 days had passed. (*See* Texas W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e); Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993.) He states he was advised to file a new claim and he describes his "new injury" or "reinjury" as pain in his back and numbness in his legs and that it resulted from bouncing which is a part of driving a bus. He states that he was not able to work after (date of injury), even in a light duty capacity and, although there is no medical notation to such effect, that his doctor told him he could not work. (There were certain restrictions placed on the claimant involving lifting limits, excessive walking, sitting etc., which did not appear inconsistent with at least some of the light duty available). The claimant is quite heavy set and one medical report mentions that because of his weight and multiple level disease, surgical intervention would not be to his advantage and recommends continued weight loss.

The medical records admitted indicate that the claimant has experienced continued back pain, that it has improved, but that he was "severely laid up with back pain since" the bus trip. One medical report from Dr. H which compares MRIs from June 1991 and January 1993 which shows significant changes, states that "it is of course quite impossible to state definitively whether these changes are due to a reinjury or possibly inevitable degenerative changes, although they are most likely the product of both." In a subsequent Report of Medical Evaluation (TWCC Form 69) dated "3-17-93" signed by Dr. S, he refers to the date of injury as "2-23-91" although Dr. S, in a report of January 11, 1993, refers to "this reaggravation of his injury." A letter dated September 4, 1992, from Dr. S states that the claimant has reached his level of MMI and will have a five percent impairment. Dr. S states he has encouraged the claimant to follow-up with the pain specialist as he may get symptomatic relief.

As indicated, the hearing officer determined that a new or distinct injury was not sustained on (date of injury); rather, that the claimant has a continuation or on-going injury which occurred in 1991. Whether a claimant sustained an aggravation which amounts to a new injury or merely suffered a continuation of an original injury is a question of fact for the fact finder. Texas Workers' Compensation Commission Appeal No. 93317, decided June 4, 1993; Texas Workers' Compensation Commission Appeal No. 92681, decided February 3, 1993; Texas Workers' Compensation Commission Appeal No. 92654 decided January 22, 1993; and, Texas Workers' Compensation Commission Appeal No. 92655, decided January 22, 1993. A return to work does not automatically transfer an original injury into a new injury when symptoms recur. Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992. This can arise particularly where a claimant returns to work and is not 100% over the effects of an injury and experiences subsequent pain or medical problems related to an original injury. Appeal 93317, *supra*. *See also* Texas Workers' Compensation Commission Appeal No. 92518, decided November 16, 1992. Regarding disability for the period in question, there is evidence to support the hearing officer's finding and conclusion that the claimant did not suffer disability. Given the scope of light duty which the claimant had performed and the lack of medical evidence that other than some restrictions (which appeared to be compatible with the light duty) applied to the claimant following May 28th, the hearing officer is sufficiently supported in his determination.

The hearing officer is the fact finder and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e)&(g). He is the one to resolve conflicts and inconsistencies in the evidence and testimony. Texas Workers' Compensation Commission Appeal No. 92234, decided August 13, 1992. Only if his findings are determined to be so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust is there a sound basis to disturb them. Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. We do not find that to be the case here.

Accordingly, the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge